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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 779 .

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S. A.; and MACANDREWS & FORBES CO.,

Petitioners,

—against—

J. C., N. C. and A. C. HADJIPATERAS and HELLENIC LINES, LTD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY N. LONGLEY,
JOHN W. R. ZISGEN,
Counsel for Petitioners,
99 John Street,
New York City.

BIGHAM, ENGLAR, JONES & HOUSTON,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The American Tobacco Co.; R. J. Reynolds Tobacco Co.; Bank of Greece; Brown & Williamson Tobacco Corp.; Commercial Co. of Salonica Ltd.; John D. Nicolaou and Nicholas Nicolaou, co-partners, doing business as D. Nicolaou Sons & Co.; A. Michaelides, S. A.; and MacAndrews & Forbes Co., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 2223-2243) is reported at 81 F. Supp. 438. There was a supplemental memorandum (R. 2244) and the court filed detailed findings of fact and conclusions of law (R. 2245-2265). The opinion of the Court of Appeals for the Second Circuit (R. 2346-2351) is reported at 194 F. (2d) 449.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was filed on February 20, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

Statement.

Your petitioners were the owners of tobacco and licorice root laden on the Greek S. S. "Katingo Hadjipatera" at Eastern Mediterranean ports for carriage to United States ports. Hereafter we shall refer to the vessel as the "Katingo." J. C., N. C. and A. C. Hadjipateras were Greek citizens doing business as Hadjipateras Brothers, who owned the vessel. We shall hereafter refer to them as "Hadjipateras." Hellenic Lines, Ltd., was the charterer of the vessel which it put on berth as a common carrier; it issued the bills of lading as the contracts of carriage. We shall refer to it hereafter as "Hellenic."

The cargo of your petitioners became seriously damaged during the course of the voyage. Hadji-

pateras filed a petition for limitation of liability under U. S. C. Title 46, sec. 183-5 and your petitioners filed claims and answers to the petition in the limitation proceedings. Your petitioners also filed libels *in personam* against Hellenic as the contracting carrier and those libels were consolidated with the limitation proceedings instituted by Hadjipateras.

Fire broke out in #3 hold of the "Katingo" during the voyage. The District Court found that Hadjipateras were not liable for any of the damage sustained by the tobacco and licorice root carried on the vessel but that Hellenic was liable for the damage sustained by most of the tobacco carried in the #3 tween deck and #3 hold and for the damage to the licorice root in the #3 hold. The Court of Appeals for the Second Circuit affirmed the decision of the District Court as to Hadjipateras; but it reversed the decision below that Hellenic was liable for the damage to the tobacco and licorice root carried in the #3 compartments.

The Questions Presented.

1. *Do the statutes which provide that an ocean carrier shall not be liable for fire (U. S. C. Title 46, sec. 182; sec. 1304 (2) (b))* afford an exemption for all damage to all cargo stowed in a compartment where a fire eventually breaks out, when fire was not the proximate cause of most of the damage?*

Most of the damage sustained by the tobacco in the #3 compartments was caused by the heating of

* Set out in supporting brief at p. 22.

the tobacco of your petitioner, Brown & Williamson Tobacco Corp., before that tobacco ignited. The ignition of the Brown & Williamson tobacco did not increase its own damage because it was already worthless. However, when it did ignite, heat from that fire and contact with water used to extinguish it, increased the damage sustained by the other tobacco in the #3 compartments which was not already worthless, the extent of that increased damage being largely undeterminable.

The statutory fire exemptions are only applicable after cargo actually ignites with a visible flame.

The Buckeye State, 39 F. Supp. 344 at p. 347 (W. D. N. Y.);
Cargo Carriers Inc. v. *Brown S. S. Co. et al.,* 95 F. Supp. 288, at p. 290 (W. D. N. Y.);
Western Woolen Mill Co. v. *Northern Assurance Co.,* 139 Fed. 637 (C. C. A. 8).

We submit that a carrier who seeks the benefit of the statutory exemptions from liability for fire must prove that the damage in relation to which he seeks exemption proximately resulted from fire. When part of the damage resulted from fire and part from other causes and the carrier is unable to prove what part of the damage resulted from fire, he has not established his right to the benefit of the statutory fire exemptions. *The Vallescura,* 293 U. S. 296 at pp. 303-4.

We submit that it cannot possibly be said that a carrier is free from liability under the statutory fire exemptions, for damage to cargo which was never on fire and which was not damaged by the heat of a fire

or by water used to extinguish a fire, merely because it became damaged while in a compartment where fire subsequently broke out.

The Fire Statute affords a vessel owner exemption from liability for damage "which may happen * * * by reason or by means of any fire"; and the Carriage of Goods by Sea Act fire exception relates to "loss or damage arising or resulting from * * * fire."

The District Court held that the Fire Statute exonerated Hadjipateras from liability for all damage sustained by all the cargo in the #3 compartments on the authority of *The Venice Maru,* 133 F. (2d) 781 (C. C. A. 2), affirmed 320 U. S. 249. In that case fire broke out in fishmeal spontaneously. Apparently smoke from the fire was the first sign that it had been heating. While presumably the meal must have heated for an appreciable length of time before it fired, over what period the prior heating extended did not appear. The greater part of the damage involved in that suit was to cargo other than the fishmeal and was the direct result of the fire which eventually broke out. No point was made of the matter by cargo owners, so far as concerns the fishmeal, and all courts merely agreed with counsel that all of the damage sustained by cargo was the proximate result of fire.

In the present case, the District Court did not deal with the question we present, so far as concerns Hellenic, as it held that Hellenic was not entitled to the fire exception of the Carriage of Goods by Sea Act in connection with any of the cargo in the #3 compartments.

The Court of Appeals did not discuss this question except to say (R. 2349-2350):

> "Since the trial judge correctly found on the evidence that there was no fault in the stowage or care and custody of this tobacco previous to the fire, we conclude that, all else aside,[11] the trial judge correctly rejected the contention that exculpation must be denied as to that portion of that tobacco which may have been—which was not proved not to have been—in whole or part damaged (through heat in the course of the voyage or otherwise) before the fire broke out."

In its note "11" the court cited *The Venice Maru* (*supra*).

The Venice Maru does not touch at all on the question we present in connection with damage to tobacco not resulting from fire, smoke, the heat of a fire or by contact with water used to extinguish a fire; but which was caused by heat from other tobacco before that other tobacco ignited. Moreover, we submit that *The Venice Maru* has but a remote relationship to the question we raise as to the Brown & Williamson Cavalla lot which became worthless before it ever ignited.

While your petitioners hold the view that the evidence establishes gross negligence in the care and custody of the cargo during the voyage, we are faced with the finding of both courts below that there was no such negligence. As the District Court expressly found that the cargo damage in the #3 compartments proximately resulted from negligence in stowage (Finding 30, R. 2250; Finding 94, R. 2260; Opinion, R. 2233); and the greater part of the opinion of the

Court of Appeals is taken up with an interpretation of that finding, we can offer no explanation for the assertion in the opinion of the Court of Appeals (R. 2349) that the question now under consideration is not presented because the trial judge found that there was "no fault in the stowage."

Moreover, the question we propound is presented whether or not the cargo owners have established that the damage to their cargo in the #3 compartments resulted from negligent stowage, as was found by the District Court.

The District Court found that all the tobacco in the #3 compartments was delivered to the carriers in normal condition for transportation (Finding 91, R. 2260; Opinion, R. 2237). When cargo delivered into the custody of a common carrier in good order subsequently sustains damage while in the carrier's custody, it has the burden of establishing what part, if any, of the damage was from a cause for which it is not liable; and if it cannot satisfy this burden it is liable for all the damage. *The Vallescura,* 293 U. S. 296, at p. 306.

The Court of Appeals held that the cargo owners must carry the burden of proving not only the cause of the damage of the cargo which eventually ignited spontaneously, but also of the other cargo which sustained all or most of its damage before there was any fire. The Court of Appeals did not find that the stowage was proper: it found that cargo owners had not sustained the burden which it held was theirs, of proving what particulars of stowage made it improper.

The Carriage of Goods by Sea Act provides that a carrier shall be liable for damage to cargo resulting from negligence in stowage; and no contractual provision can void that liability (Title 46, U. S. C., sec. 1303 (2), 1303 (8)). Under the ruling below, a carrier escapes liability for heating damage to cargo whether it results from negligence in stowage or from some unexplained reason, if subsequent inaction over a long enough period eventually causes ignition of any part of the cargo in the affected compartment. This, we submit, cannot be. Surely, the policy of the law is to encourage diligence by a carrier, not to encourage inaction.

We submit that both Hadjipateras and Hellenic must carry the burden of proving what part of the damage suffered by the cargo was the proximate result of fire; and that they are liable for all damage not proven to be within the statutory exemptions.

2. *When fire in cargo is caused by negligent stowage, what additional proof is required of a cargo owner under the provisions of the fire exception of the Carriage of Goods by Sea Act* (U. S. C. Title 46, sec. 1304 (2) (b)), *as a condition precedent to recovery from a carrier for the fire damage suffered by the cargo.*

This question presents for consideration the general policy of the law in interpreting and applying the statutory fire exemption of the Carriage of Goods by Sea Act. The exemption is not absolute but conditional. The Act provides exemption to a carrier—

> "for loss or damage arising or resulting from * * * (b) fire, unless caused by the actual fault or privity of the carrier."

It has been held that under this statute the cargo owner must carry the burden of proving the cause of a fire and that some managing representative of the carrier was negligent in relation thereto (*Hoskyn & Co.* v. *The Silver Line (The Silver Cypress),* 143 F. (2d) 462 (C. C. A. 2).

The Court of Appeals meticulously refrained from reversing the specific finding of the District Court that the solid stow of the #3 tween deck of the "Katingo" when the vessel sailed on her voyage, was improper and negligent. In reversing the decision holding Hellenic liable, the Court of Appeals merely found that your petitioners had not established (R. 2348):

> "precisely how the cargo in #3 tween deck was stowed or, particularly, where the 139 bales in the #3 tween deck were placed when the loading was completed on November 2nd, 1940;"

and that, therefore, they had not established (R. 2349):

> "that the stowage of the additional 139 bales in #3 tween deck so impeded ventilation of the #3 hold as to cause the fire damage to cargo stowed there."

As the "Katingo" sailed on her voyage with her #3 tween deck stowed solidly with tobacco, without any means of providing ventilation of the tobacco in the hold by opening the weather deck hatch and without any provision for inspection during the voyage of the tobacco in the #3 hold (Opinion, R. 2229), and it was found that that stowage was negligent (Opinion, R. 2230), we submit that it is quite irrelevant

where any particular shipment of cargo was stowed, inasmuch as the completed stowage was improper.

The District Court had before it the stowage plan prepared at Piraeus before the "Katingo" sailed from that port showing the #3 tween deck solidly filled with tobacco; the testimony of the ship's officers that the #3 tween deck was stowed solidly with tobacco; testimony that the "Katingo" had been stowed by Hellenic's supercargo who reported to its managing director how the vessel was stowed (Finding 22, R. 2248; Opinion, R. 2231); the testimony of Hellenic's managing director that he examined the ship's stowage plan and knew how the vessel was stowed (R. 920-1); that before October 28th he knew she already had all the cargo which she could safely carry on the cool North Atlantic voyage then contemplated (Opinion, R. 2235); that later, when he knew that the "Katingo" would sail on the long hot voyage via the Cape of Good Hope, he ordered the stowage on the vessel of 1552 additional bales (Finding 28, R. 2249; Opinion, R. 2235); and evidence that he knew that 139 of these bales were stowed in the #3 tween deck (Opinion, R. 2235).

The opinion of the District Court makes it clear that it was the overstowage of #3 tween deck which was improper—without relation to which particular shipments created the overstowage (Opinion, R. 2229, 2233, 2234).

The Court of Appeals said (R. 2348) that as Hellenic's managing director

"did not come on board to inspect or direct the

> distribution of the added cargo, there is no evidence that he knew the precise manner of stowing the 139 bales in #3 tween deck."

While the court went on to assume *arguendo* that Hellenic was responsible for any fault in stowage, the whole opinion discloses that the court held the view that before there could be any recovery your petitioners were obligated to prove with meticulous care exactly where every shipment of cargo was stowed and that the carrier was fully informed of the exact location of the stowage of the respective shipments.

The holding of the Court of Appeals that a cargo owner must carry the burden of establishing not only that the fire was caused by the carrier's personal negligence but also the details of the negligence, is in conflict with the decisions of the Court of Appeals for the Fourth Circuit construing the Fire Statute, in *Hines* v. *Butler (The Virginian)*, 278 Fed. 877 at p. 880, and *Bank Line Ltd.* v. *Porter (The Poleric)*, 25 F. (2d) 843 at p. 845; and of the Ninth Circuit in *Pacific Guano & Fertilizer Co.* v. *Williams S. S. Co. (The Willfaro-The Willsolo)*, 9 F. (2d) 940 (N. D. of Calif.), 9 F. (2d) 622 (C. C. A. 9).

A vessel owner is entitled to limit his liability under U. S. C. Title 46, Sec. 183, if damage to cargo occurs "without the privity or knowledge of such owner." If a vessel owner has knowledge of a general condition which presents danger of loss, it has long been held that he is not entitled to limitation of liability.

> *Christopher* v. *Grueby (The Commonwealth)*, 40 F. (2d) 8 at pp. 13-14 (C. C. A. 1);

Petition of Diamond Coal & Coke Co., 297 Fed. 242 (W. D. of Pa.), 297 Fed. 246 (C. C. A. 3); *Sabine Towing Co., Inc.* v. *Brennan (The Edgar F. Coney)*, 72 F. (2d) 490 at pp. 491, 493-4 (C. C. A. 5).

When a vessel is tied up close to a carrier's office and he has ample opportunity to learn of an improper condition or negligent operation which subsequently leads to disaster, he is personally negligent if he does not take steps to obviate the danger, and is not entitled to limitation of liability.

Spencer Kellogg & Sons, Inc. v. *Hicks*, 285 U. S. 502 at pp. 511-512;
Petition of Diamond Coal & Coke Co. (supra) (Third Circuit);
Christopher v. *Grueby*, 40 F. (2d) at p. 14 (First Circuit);
The Calvert, 51 F. (2d) 494, at p. 498 (Fourth Circuit);
The New Berne, 80 F. (2d) 244 at p. 248 (Fourth Circuit);
In re Great Lakes Transit Corp., 81 F. (2d) 441 at p. 444 (Sixth Circuit).

3. *When cargo of a type which may heat spontaneously if not properly cared for, is in good condition at time of shipment for carriage on the voyage which the carrier contracts to make but, subsequently, carriage on that voyage is made impossible and the carrier transports the cargo on a much longer and hotter voyage, must a cargo owner as a condition precedent to recovery from a carrier for damage to his cargo by heating, establish by definite proof that the cargo was in such condition that it could be safely*

carried on the new route, not contemplated when the cargo was stowed?

The District Court found that all of the tobacco on the vessel was in good normal condition for carriage from the ports of loading to U. S. ports on the route contracted for in the bills of lading issued by Hellenic (Finding 91, R. 2260; Opinion, R. 2237).

As only two lots of cargo stowed in the #3 compartments heated spontaneously, the District Court found immaterial the condition of the other lots for carriage on the route eventually undertaken (R. 2238). It held, however, that although the Brown & Williamson Cavalla tobacco and the Volos tobacco owned by American Tobacco Co. was in good condition for carriage on the route originally contracted for, via Gibraltar, it had not been established that it was in proper condition for carriage via Suez and the Cape of Good Hope (R. 2237). For that reason it held that the owners of these two lots could not recover for the damage which these lots sustained, even though improper stowage was a proximate cause of the damage. The District Court discussed (R. 2236) the decision of this Court in *The Vallescura* (*supra*) but held that recovery should be denied because of the decision in *The Niel Maersk*, 91 F. (2d) 932 (C. C. A. 2).

In *The Niel Maersk* a cargo of fish meal heated spontaneously and negligent stowage was proximately related to the heating. However, recovery from the carrier was denied because there was no evidence as to the condition of the fish meal on shipment.

In the instant case it was established that the Cavalla and Volos tobacco was in good condition for

carriage on the route contracted for. As its damage resulted from causes arising subsequent to its stowage on the "Katingo" and as negligence in stowage was the principal cause, we submit that the case presented by the findings of the District Court is governed by *The Vallescura* (*supra*) and that the carriers are faced with the burden of establishing the extent of any damage resulting from causes for which they are not liable.

The Court of Appeals did not discuss this question as it held that Hellenic was not liable for any of the damage to the tobacco. The District Court pointed out (R. 2236-7) that *The Niel Maersk* is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Nichiyo Maru*, 89 F. (2d) 539.

Reasons for Allowance of the Writ.

1. The proper interpretation and application of the Fire Statute and the fire exception of the Carriage of Goods by Sea Act, are of immense importance to cargo owners and ocean carriers: a very high percentage of claims of cargo owners against carriers arises out of fires.

2. It has frequently been pointed out that one of the greatest deterrents of negligence is sure knowledge that liability for negligent damage will fall upon the wrongdoer. Under the decision below a carrier is much better off if he is inactive than if he is diligent: it was held that if damage to cargo caused by negligent stowage is permitted, through long inaction, to develop to the point of ignition of one lot, a carrier is entitled to statutory fire exemptions

in connection with all cargo in the affected compartment, including that which sustains no damage from the fire.

3. While it is the spirit of the fire exemption of the Carriage of Goods by Sea Act that a carrier shall not be liable for damage resulting from fire caused by the negligence of minor employees or agents, it is also its spirit that a corporate carrier shall not escape liability when fire damage to cargo results from improper conditions with which the carrier's managing director was fully conversant. The holding of the Court of Appeals that the statutory exemption inhibits a cargo owner from reliance upon any inference but that he must by affirmative proof establish "precisely how the cargo * * * was stowed", throws a burden on a cargo owner which no other case has required and is in conflict with decisions in other Circuits.

4. The holding that a cargo owner may not recover for heating damage to his cargo which proximately resulted from negligent stowage, unless it is established that the cargo was in actual good order for carriage on the voyage eventually undertaken, even though it is established that the cargo was in good order for the voyage originally contracted for, is in conflict with the principle of the decision of this Court in *The Vallescura* (*supra*); and is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *The Nichiyo Maru,* 89 Fed. (2d) 539 at p. 543. The District Court pointed out this conflict in its opinion (R. 2236-7).

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the

seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket *"The American Tobacco Co. et al.* against *J. C., N. C. and A. C. Hadjipateras and Hellenic Lines, Ltd.,* Docket No. 21874;" and that the said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

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By HENRY N. LONGLEY,
JOHN W. R. ZISGEN,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In this brief we shall limit ourselves to a summary of the facts of the case pertinent to the questions presented in the petition, and to a short discussion of the findings and conclusions below. We shall largely rely on the findings and opinion of the District Court: the Court of Appeals discussed few facts; it found that, except as specifically noted to the contrary, the evidence supports the findings below. The facts we set out were found by the District Court or where not mentioned in its findings or opinion, they are established by undisputed evidence.

The "Katingo" was placed on berth as a general ship engaged in the common carriage of merchandise by sea, by Hellenic. Its head office was in Piraeus and its managing director was resident there.

On October 28, 1940, when war broke out between Greece and Italy, the "Katingo" lay at Piraeus about to sail for United States ports via Gibraltar (Findings 45-47, R. 2252-3). She was then laden with all of the cargo which she could properly carry on the cool voyage via Gibraltar, to the knowledge of Hellenic's managing director (D. C. Opinion, R. 2229, 2235; Opinion of Court of Appeals, R. 2348). The master also knew that she was then fully loaded (R. 460, 1466, 1650). Her #3 hold was immediately aft of the engine room. At the bottom of that hold licorice root was stowed to a height of about 8 feet and bales of tobacco filled the remainder of the hold. Tobacco also substantially filled the #3 tween deck (D. C. Opinion, R. 2229).

Tobacco, as a vegetable product, presents the danger of spontaneous heating during transportation if it is not carefully stowed and cared for.

The war made it impossible for this Greek flag ship to sail to United States ports via Gibraltar (Finding 48, R. 2253); and the only other possible route was via Suez and the Cape of Good Hope, on which she would cross the Equator twice (Findings 49, 53, R. 2253, 2254).

After it was known that the "Katingo" would sail on the long hot route of about 13,000 miles rather than on the short cool one of about 5,000 miles (Finding 53, R. 2254), instead of taking steps to improve

the ventilation of the tobacco stowed in the hot #3 hold, on November 2nd Hellenic directed the master to stow 1552 additional bales of tobacco on the vessel. Of this lot 139 bales were stowed in the #3 tween deck (Finding 28, R. 2249; Opinion of Ct. of Appeals, R. 2347) and 556 bales in #3 hold (R. 462; Cargo Ex. 30H, R. 2091).

When the "Katingo" sailed on her long hot voyage, her #3 tween deck was stowed solidly with tobacco and, as stowed, no ventilation could reach the tobacco in the hold by opening the weather deck hatch; nor was there any means of access to the hold to permit examination of the cargo stowed there. The officers of the ship testified to the solid stowage (R. 1614, 1469-1471, 1353); the stowage plan prepared at Piraeus by Hellenic before the vessel sailed,* shows a solid stowage (Cargo Ex. 3, contained in a separate folder of exhibits, nine copies of which have been furnished to the Clerk for the use of the Court); the District Court so found (Findings 28-30, R. 2249-2250; Opinion, R. 2229-30, 2233); and the Court of Appeals did not reverse that finding.

The "Katingo" sailed from Elefsis, just outside Piraeus, on November 10, 1940; she was delayed 18 days at the Suez Canal; put in and remained three days at Port Sudan, two days at Mombassa, Kenya, and three days at Lourenco Marques, Portuguese East Africa (Finding 59, R. 2254). She sailed from Lourenco Marques on January 10, 1941, and arrived at Pernambuco on February 4th (Findings 60-61, R. 2255).

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* The Court of Appeals mistakenly asserted that there was no such stowage plan—see statement, *infra*, p. 24.

While the vessel was lying in the tropical ports of Port Sudan, Mombassa, Lourenco Marques and Pernambuco and while she was sailing between those ports, great heat was encountered (R. 1408, 1410, 1412-3, 1421, 1424, 1429, 1434, 1566-7, 1610).

Between Lourenco Marques and Pernambuco clouds of insects emerging from the ventilators serving the #3 hold (Finding 61, R. 2255), gave notice that the tobacco in that hold was heating (R. 793-4); and at Pernambuco abnormal heat was found rising from the ventilators serving that hold (Finding 61, R. 2255). The "Katingo" sailed from Pernambuco on February 4th, put in at Santa Lucia on February 15th, and on February 17th, while the vessel was at sea between Santa Lucia and Newport News, a spontaneous fire broke out in one lot of tobacco stowed in the #3 hold. An opening was made in the stow in the #3 tween deck by removing bales of tobacco to the deck; water was pumped into the hold, and the fire was eventually extinguished (Findings 62, 68, R. 2255-6).

From the time that abnormal heat was first noted rising from the #3 hold—found by the District Court to be on February 4th, while the vessel was at Pernambuco—until the fire broke out some two weeks later, abnormal heat continued to rise from the #3 hold (Finding 65, R. 2255). From the time the "Katingo" sailed from Piraeus on her voyage, on November 10th, until the spontaneous fire broke out in the tobacco in the #3 hold on February 17th (98 days later), the solid stow of tobacco in the #3 tween deck remained undisturbed (R. 1615).

Spontaneous ignition of the tobacco was limited to one lot of bales owned by your petitioner, Brown & Williamson Tobacco Corp., stowed toward the center of the #3 hold (Finding 86, R. 2259). The long continued spontaneous heating had rendered that shipment worthless before it eventually ignited (R. 388, 671). Moreover, before there was any fire, heat from the Brown & Williamson tobacco had rendered worthless or seriously damaged most of the other tobacco stowed in the #3 compartments (R. 388). The fire in the Brown & Williamson lot spread to one adjacent lot only. Water used to extinguish the fire added to the damage of some lots which had not already become worthless before the fire.

Based on the undisputed evidence as to the solid stow of the #3 tween deck when she sailed on her voyage, as established by the stowage plan and the testimony of the ship's officers, and on the expert testimony, the District Court found (Record 2250):

> "30. Stowage of No. 3 tweendeck was improper and negligent in relation to the actual voyage undertaken by the vessel via Suez, in that no passage of any kind was left for access to No. 3 hold below or for the passage of appreciable quantities of air through the tweendeck to and from No. 3 hold below."

The District Court also found that the negligent stowage was a proximate cause of the spontaneous heating of the Brown & Williamson tobacco leading to its eventual ignition (Finding 94, R. 2260).

The District Court held (R. 2234-5) that rights between your petitioners and Hadjipateras in relation to all damage sustained by all the tobacco and licorice root stowed in the #3 compartments—whether resulting from the fire or from the long continued spontane-

ous heating before there ever was any fire,—were governed by the Fire Statute (U. S. C. Title 46, sec. 182); and that rights between your petitioners and Hellenic for all the damage enumerated, were governed by the fire exception of the Carriage of Goods by Sea Act (U. S. C. Title 46, sec. 1304 (2) (b)). The pertinent provisions of those statutes are as follows:

THE FIRE STATUTE (Title 46 U. S. C., section 182):

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

FIRE EXCEPTION OF CARRIAGE OF GOODS BY SEA ACT (U. S. C. Title 46, section 1304 (2)):

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * *

(b) Fire, unless caused by the actual fault or privity of the carrier."

The District Court held that as Hadjipateras, although living in Piraeus, were ignorant of exactly how the ship was stowed as she lay at Piraeus, they were exonerated from liability under the Fire Statute. It found that Hellenic's supercargo, who supervised the stowage at all ports, fully advised its managing director as to how the vessel was stowed (Opinion, R. 2231, 2235); and that, therefore, it was not en-

titled to the statutory fire exemption (R. 2235). It held, therefore, that Hellenic was liable for the damage sustained by the tobacco and licorice root stowed in the #3 compartments with two exceptions: it held that your petitioner Brown & Williamson Tobacco Corp., was not entitled to recover because its cargo heated spontaneously; and that your petitioner, The American Tobacco Co., was not entitled to recover for heating damage sustained by its Volos tobacco because it was found that this lot also heated spontaneously to some degree (R. 2235-2238). However, recovery was decreed for damage to the latter lot resulting from smoke and contact with water used to extinguish the fire in the Brown & Williamson lot (R. 2244).

Recovery was denied for damage to the two lots which heated spontaneously because, while it was established that they were in good order for carriage on a voyage to United States ports "via Gibraltar," it was found that it had not been established that they were in good order for carriage on the route which the vessel eventually followed (Findings 91-92, R. 2260; Opinion, R. 2237-8).

The Court of Appeals affirmed the decision of the District Court that Hadjipateras were not liable for any of the damage sustained by the cargo stowed in the #3 compartments because, it found, that your petitioners had not "carried the burden of proving that the fire was caused by the shipowner's design or negligence," according to the terms of the Fire Statute.

In considering Hellenic's liability, the Court of Appeals largely limited itself to interpreting the findings of the District Court. It construed the findings as a determination by the District Court that, before

the last lot of 139 bales was stowed in the #3 tween deck, the stowage of that compartment was proper. It then found (R. 2348) "There is no evidence to show precisely how the cargo in #3 tween deck was stowed, or, particularly, where the 139 bales in #3 tween deck were placed when the loading was completed on November 2, 1940." It held that there was "no justification" for inferring in cargo's favor that the 139 bales were so stowed as to impede ventilation. It specifically rejected what it said was the finding below: "that the stowage of the additional 139 bales in #3 tween deck so impeded ventilation of #3 hold as to cause the fire damage to cargo stowed there."

As this Court is interested only in important legal principles of general interest and not in misconceptions of the evidence by a court below, we merely comment in passing on the erroneous assertion of the Court of Appeals (R. 2348, note 6) that the evidence does not include any stowage plan showing how the #3 tween deck was originally stowed, but only plans made on outturn after the cargo had been shifted to fight the fire. The evidence includes a stowage plan produced by Hadjipateras (Exhibit 2, in the separate folder of exhibits) and another given to the owners by Hellenic (Exhibit 3, in the separate folder of exhibits), both prepared at Piraeus before the vessel sailed on her voyage by Hellenic, who stowed the vessel. This mistake was brought to the attention of the Court of Appeals on a petition for a rehearing (R. 2353-2363) but the petition was denied.

Respectfully submitted,

HENRY N. LONGLEY,
JOHN W. R. ZISGEN,
Counsel for Petitioners.

BIGHAM, ENGLAR, JONES & HOUSTON,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 778

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S.A.; and MacANDREWS & FORBES CO.,

Petitioners,

against

J. C., N. C. and A. C. HADJIPATERAS and HELLENIC LINES, LTD.

BRIEF OF J. C., N. C. AND A. C. HADJIPATERAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARENT TEN EYCK,
Counsel for
s/s Katingo Hadjipateras and
J. C., N. C., and A. C. Hadjipateras,
84 William Street,
New York City.

ANDRE MAXIMOV,
JAMES E. FITZGERALD,
McNUTT & NASH,
Of Counsel.

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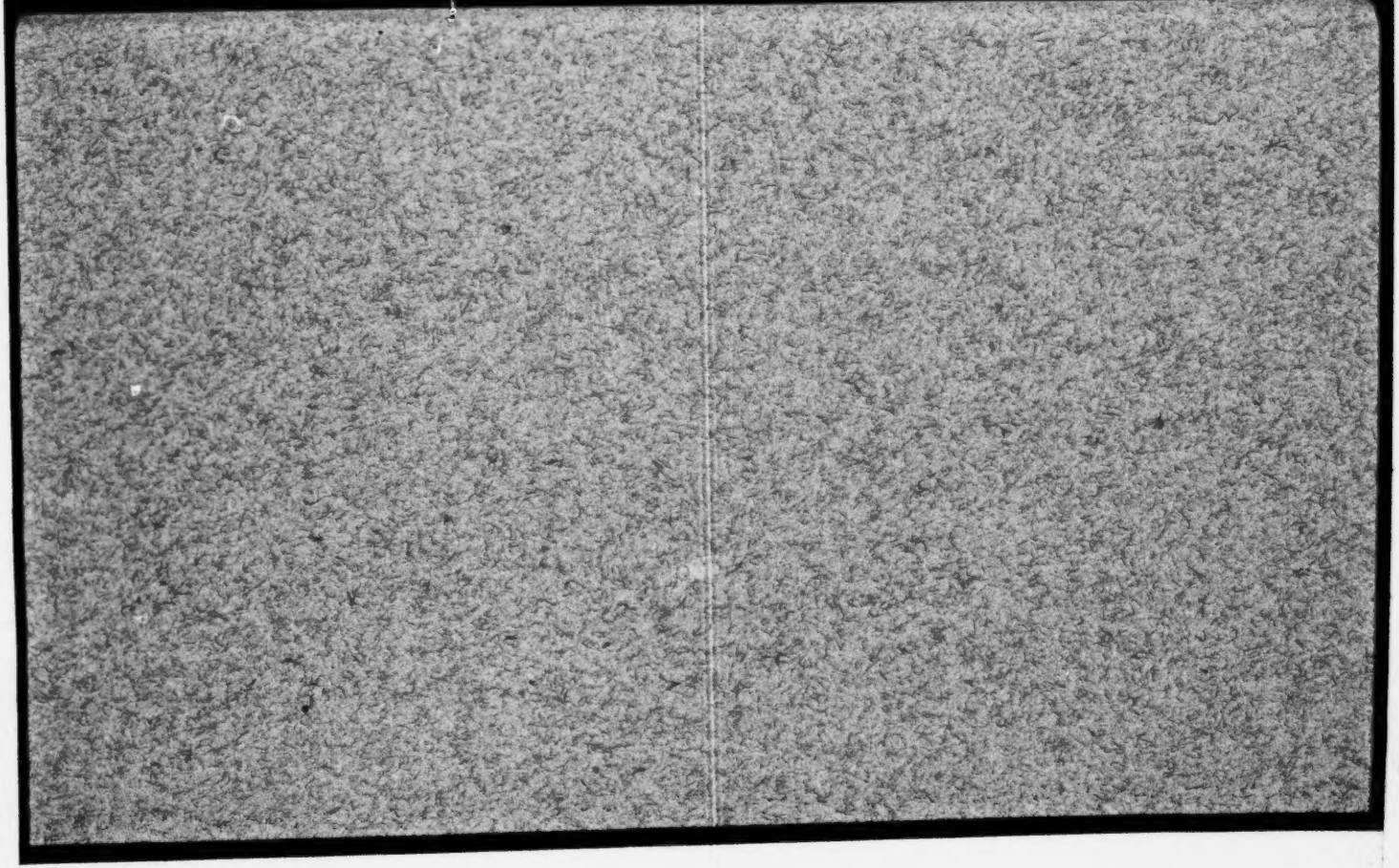

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions Below and Jurisdiction

The facts regarding the opinions below and the jurisdictional requisites are accurately stated in the petition.

The Questions Presented

Contrary to the impression sought to be created in the petition, the only issues in this case are issues of fact. The so-called questions of law, dealing with the Fire Statute

and the fire exception of the Carriage of Goods by Sea Act, can only arise if the factual issues are reexamined and the decision of the Court of Appeals is first reversed on the facts.

Statement

(a) Background

The Katingo Hadjipatera (the ship), owned by the three Hadjipateras brothers (owners), was under charter to Hellenic Lines, Ltd. (charterer), to transport general cargo from Mediterranean ports to the United States via Gibraltar. On October 28, 1940 she was at Piraeus, her last scheduled port of loading, loaded primarily with tobacco and waiting for orders. War broke out between Italy and Greece. On November 2nd the charterer booked and stowed an additional consignment of 1,552 bales of tobacco, of which 139 were placed in the No. 3 tweendeck. Piraeus being under aerial attack, the ship was ordered on November 3 to an outside anchorage. The principal owners of the tobacco, preferring the risks of an equatorial voyage to the probable complete loss of the cargo in Greece, urged the charterer and the Greek Government to send the ship here via Suez and the Cape of Good Hope. The Government ordered the ship in convoy to Port Said and to follow instructions of the British Admiralty for the rest of the voyage. The ship arrived at Newport News, Va., February 26, 1941 after 118 days and two crossings of the Equator, an unprecedented voyage for tobacco. In spite of the arduous voyage, the cargo by and large outturned sound except for damage in or caused by two lots of tobacco which self-heated and some damage, comparatively unimportant, to miscellaneous cargo.

(b) The Essential Findings

The Trial Court found that the ship was in all respects seaworthy, properly manned and equipped, and that her ventilating facilities were adequate and proper; that due diligence to make her so was exercised by the owners at the commencement of the voyage from all loading ports, and that in respect of the care and custody of the cargo and the prosecution of the voyage, the master, under all the circumstances, exercised due diligence, sound discretion and prudent judgment, and took the action he deemed most expedient and in the best interest of all concerned (F. 7, 19, 77-8, 101; 2245-8, 2258, 2262). Two lots of tobacco (Brown Williamson's Cavalla and American Tobacco Company's Volos) self-heated wherever stowed, and no other lots self-heated (F. 88; 2259-60). Part of the Brown Williamson lot was in No. 3 hold; it self-heated and ignited due to spontaneous combustion (F. 85-6; 2259). These two lots were more susceptible to self-heating than other tobacco on the ship (F. 88, 93; 2259-60). Excessive moisture content is a significant causal factor in the self-heating of such tobacco when baled (F. 89; 2260). The stowing of all cargo was entirely under the control of the charterer, whose agent personally directed it and had it done by its employees. The master neither directed nor interfered with the stowage; other than the master no person of authority connected with the vessel owners had personal knowledge of the details of the stow; they took no personal part in the stowage and were unfamiliar therewith. The tobacco was properly stowed, except for the stowing of the additional 136 bales in #3 tweendeck (F. 20-30, 36-40; 2248-2251).

On the basis of these findings the Trial Court decided that the owners were not liable *in personam* for damage to cargo; that there is no liability for damage to the lots

which self-heated; that charterer alone was liable for all damage to other tobacco in No. 3 hold and tweendeck; that there is no liability for damage elsewhere to tobacco which self-heated or to adjacent tobacco damaged as a consequence. Owners' prayer for limitation, as well as for exoneration, was granted, except as to miscellaneous cargo claims, with right of recoupment from charterer. Cargo owners except one were held liable to contribute with the ship owners in general average (conclusions of law 1-16, 2263-5).

(c) The Findings as to No. 3 Tweendeck

The crucial fact in this case is that all tobacco damage was basically caused by the self-heating of two lots of tobacco, and that some of this tobacco, stowed in No. 3 hold, caught fire. Only these two lots, which were more susceptible to self-heating than others similarly stowed, and they self-heated, regardless of where stowed (F. 81-91, 93-4, 2258-61). However, the Trial Court, having found that although No. 3 hold was properly stowed (F. 26, 2249) and that No. 3 tweendeck was originally properly stowed, found that the additional 139 bales of tobacco were stowed in No. 3 tweendeck so "as to block ventilation and deny access to the hold below"; and that therefore "stowage of No. 3 tweendeck was improper and negligent" (F. 28-30, 2249-50).

(d) The Opinion of the Court of Appeals

The Court of Appeals sustained all the findings, except those dealing with the loading of No. 3 tweendeck. It said:

> "Except as to matters discussed in the succeeding paragraphs, we think the evidence amply supports

his (the Trial Judge's) findings, and that those findings justify his legal conclusions. * * *

> No liability could be imposed [as to fire damage] unless the owners of those goods carried the burden of proving that the fire was caused by the shipowner's design or negligence or the carriers' actual fault or privity. *Haskyn & Co.* v. *Silver Line,* 143 F. (2d) 462 (C. A. 2). The trial judge, on the evidence, correctly held that this burden had not been carried with respect to the shipowners" (2346-7).

Thus, in any event, there can be no issue as against these respondents.

The Court of Appeals then proceeded to analyze the findings relating to No. 3 tweendeck. After stating that they imply that the stowage had been proper before the addition of the 139 bales and after pointing out that "the trial judge was mistaken" as to the meaning and inferences to be drawn from evidence on which he had relied (2347), the Court of Appeals went on to say:

> "the crucial question is this: Is there substantial evidence that the 139 bales were so stowed as to impede the presumably adequate ventilation existing theretofore? We think not. * * * The trial judge found that there had been no negligence in the stowage of No. 3 tweendeck and No. 3 hold, before the 139 bales were added; this seems to imply that it was not necessary, for adequate ventilation and inspection of the cargo in No. 3 hold, to leave a vertical shaft, in the way of the weather deck hatch, down to No. 3 hold. In any event, the 139 bales, if superimposed on other cargo already properly stowed, could not have sealed off such a shaft" (2348-9).

The Court's conclusion was as follows:

> "Here, then, we are obliged to reject the finding that the stowage of the additional 139 bales in No. 3 tweendeck so impeded ventilation of No. 3 hold as

to cause the fire damage to cargo stowed there. For, at best, that finding rests, not on any direct testimony (i. e. 'testimonial inferences'), but on a pure conjecture, derived indirectly from the testimony. So fragile a support for a trial judge's finding will not suffice.

Since the trial judge correctly found on the evidence that there was no fault in the stowage or care and custody of this tobacco previous to the fire, we conclude that all else aside, the trial judge correctly rejected the contention that exculpation must be denied as to that portion of that tobacco which may have been—or was not proved not to have been—in whole or part damaged (through heat in the course of the voyage or otherwise) before the fire broke out.

It follows that neither the Charterer, the vessel nor her owners are liable to the cargo-owners for the damage to the tobacco stowed in No. 3 hold and No. 3 tweendeck" (2349-50).

Reasons for Rejecting the Petition

(a) The first question presented by the petitioner (pp. 3-8) does not arise unless the facts are not as found by the Court of Appeals.

The Court of Appeals, after re-examining all the facts, concluded affirmatively that there had been no negligence in stowing the cargo in No. 3 hold and in No. 3 tweendeck. No amount of quoting parts of its decision out of context can alter this. Nor is there any doubt as to the meaning of the words "all else aside" in the last quoted excerpt from the opinion of the Court of Appeals. They can only mean that, regardless of the merits of an argument which would, as the trial judge put it, "nullify the Fire Statute in many, if not all, cases of spontaneous combustion—an absurd result", the question does not arise at all; for in any event, after the rejection of the finding dealing with

the stowage of the 139 bales in No. 3 tweendeck, which the Court of Appeals said were based on no evidence, "there was no fault in the stowage or care or custody of this tobacco previous to the fire" (2349-50). It follows inevitably that even assuming the theoretical propriety of separating damage from self-heating and damage from an ensuing fire, there can, in this case, be no liability for the former, unless this Court is willing to re-examine all the facts and reach a different conclusion from that of the Court of Appeals.

(b) The second and third questions presented also require a re-examination of the facts.

These two questions (petition, pp. 8, 12) postulate, contrary to the decision of the Court of Appeals, that there was in fact negligence in the stowage of No. 3 tweendeck. The second point (p. 8) is based on the premise, clearly stated in the point heading: "When fire in a cargo is caused by negligent stowage. . . ." The foundation of the argument in support of this point is that "the court (of Appeals) held the view that before there could be any recovery your petitioners were obligated to prove with meticulous care exactly where every shipment of cargo was stowed" (p. 11). The Court of Appeals expressed no such "view". What it said was that it could not accept cargo's theoretical suggestion "that 139 bales were so stowed that, in some *other* way, they impeded ventilation", in the absence of "substantial evidence to show exactly where they were stowed" (2349). Thus, the argument in support of the second point not only presupposes a reversal on the facts, but is based on a misinterpretation of the decision of the Court of Appeals; it thus collapses of its own weight.

The third point heading (p. 12) is a theoretical question relating to tobacco which may heat spontaneously "if not properly cared for", and the discussion assumes that "im-

proper stowage was a proximate cause of the damage" (p. 13) and that "negligent stowage was the principal cause" of the fire (p. 14). Again, therefore, it is assumed that this Court will review the record and find that the stowage was in fact negligent.

(c) The points raised are of no general importance.

For many years, the courts and the bar have assumed that the Fire Statute applies to all fires, whether or not caused by spontaneous combustion. Even assuming, therefore, that petitioners' theory of separability (characterized by the trial judge as "absurd") is even arguable, it is hardly one of such importance that it would warrant action by this Court at this time, particularly in the absence of any conflict between decisions of different circuits. No such conflict is even alleged to exist.

The second and third questions presented, even if they did not require a complete re-examination of the facts, seem to involve elementary questions of burden of proof and burden of going forward, again hardly questions of such importance as to justify review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

BARENT TEN EYCK,
Counsel for
s/s Katingo Hadjipateras and
J. C., N. C. and A. C. Hadjipateras.

ANDRE MAXIMOV,
JAMES E. FREEHILL,
McNUTT & NASH,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 779

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S.A.; and MacANDREWS & FORBES CO.,
Petitioners,

against

J.C., N.C. and A.C. HADJIPATERAS and HELLENIC LINES, LTD.

BRIEF FOR RESPONDENT HELLENIC LINES, LTD. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSCOE H. HUPPER
RAY ROOD ALLEN
Counsel for Respondent,
HELLENIC LINES, LTD.

BURLINGHAM, VEEDER, CLARK & HUPPER,
Of counsel.
27 William Street,
New York City.

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We cannot convince ourselves that questions of law and valid reasons exist for granting of the writ as depicted in the Petition (pp. 3-15). We urge denial because in essence only matters of fact are involved, and the contentions made as to the law are unsound. Further, this litigation ought now to be terminated, having already endured some 11 years.

The analysis set forth below shows that only matters of fact are here involved and that all issues were correctly decided by the Court of Appeals.

Argument

This case is essentially one of fact and therefore not a case for review by this Court.

The Fact Situation—as to Stowage

Because of the attack by Italy on Greece on October 28, 1940, tobacco loaded for an autumn voyage from the Near East to the United States via Gibraltar had to be carried via the Red Sea and the Cape of Good Hope. Thus at the urging of the tobacco shippers and on orders of the Greek Government, a 30 days cool voyage was converted into a 118 days voyage through the tropics, with a double crossing of the Equator (Findings 45-51; R. 2252-3). The fact question was—Whether the damage to the tobacco cargo was due to improper stowage or to the inadequacy of the tobacco to withstand the exigencies of such a voyage.

As to all compartments except No. 3 tweendeck, the tobacco stowage was held proper and petitioners do not now question such finding. The stowage in the No. 3 compartments was similar to that in the other compartments. After the vessel's originally scheduled sailing date, 139 bales of tobacco were stowed in the No. 3 tweendeck. The Court of Appeals said:

> "The trial judge found that there had been no negligence in the stowage in No. 3 tweendeck and No. 3 hold, before the 139 bales were added;" (194 F. (2d) 449, 451).

The District Court thought the 139 bales impeded ventilation and thus caused the fire in the No. 3 hold. That Court made no other criticism of the stowage; no witness testified that the 139 bales caused the fire and the final stowage in the No. 3 tweendeck was not different from that in No. 2 tweendeck which "was stowed entirely with tobacco" (F. 27; R. 2249) and was held to be "properly stowed" (R. 2243; 2264).

The Court of Appeals reversed the finding of the District Court as to the 139 bales as "pure conjecture", based on an erroneous interpretation of the Master's protest relating to discharging expenses. There remained, therefore, no condemnation of the No. 3 tweendeck stowage, the only ground of stowage criticism having evaporated.

It is not surprising that the Court of Appeals found that the 139 bales did not affect the ventilation in the hold, for cargo contended in that Court that the additional cargo was stowed "on top of the cargo already there [in the tweendeck]" (Cargo's Reply Brief, p. 2).

The fact finding, unless reversed, would prevent consideration of the legal questions raised by petitioners as a basis for allowance of the writ. For on the facts, there could be no liability on the part of the carrier, quite apart from the legal questions argued in the petition.

Petitioners contend (p. 7) that the Court of Appeals improperly put the burden on cargo to prove "what particulars of stowage made it improper". But what the Court of Appeals actually did was to reject the only qualification made by the District Court upon its finding of good stowage. Petitioners failed, not because of some error as to burden of proof, but because the facts as found were against them.

The Fact Situation—as to Privity

The sole basis for the lower Court denying to the charterer the benefit of the fire exemption was that Court's belief,—erroneous as the Court of Appeals held,—that the charterer's Managing Director was chargeable with knowledge that the additional 139 bales had turned good stowage into bad stowage (81 F. Supp., at p. 446). Since the Court of Appeals rejected the District Court's view that the 139 bales caused the fire, the finding of privity with respect thereto failed. For the Court of Appeals found non-existent the fact with which charterer's Manager was said to be charged with notice.

The Fact Situation—as to the Tobacco

As to the adequacy of the tobacco to withstand the voyage, the Court found:

> "There is no proof that any tobacco was in fit internal condition for a voyage from Greece to the United States via Suez" (F. 92, R. 2260; see also ff. 89, 90, R. 2260).
>
> "Other than the Volos and Brown Williamson Cavalla tobacco, no tobacco self-heated no matter where stowed. The Volos and Brown Williamson Cavalla self-heated wherever stowed, whether tween deck or below" (F. 88; R. 2259-60).

This completely eliminated stowage and ventilation as causative factors. This was demonstrated further in Charterer's Reply to Cargo's Petition for Rehearing in the Court of Appeals, printed at R. 2364 to 2381.

Petitioners' Proposed Emasculation of the Fire Exemption—First Question

Petitioners state as the first question presented—Whether the fire statute affords exemption for damages not proximately caused by fire (p. 3). Analysis shows that the point relates to the heating that resulted in the ignition (p. 3-4). According to petitioners, all such heating up to the time the commodity bursts into flame would be excluded, with the burden on the carrier to prove that no damage occurred during the heating that led to the ignition.

Although petitioners' argument is based on the assumption that there was heating damage unrelated to, or at least preceding, the fire, there is no finding that such was the fact, either by the District Court or by the Court of Appeals. Is this Court to go through the Record to see whether there is testimony that would support an unmade finding that would raise the legal point petitioners urge?

Although fires resulting from spontaneous combustion are common, we know of no previous claim that the fire ex-

emption imposes the burden asserted by petitioners on the party claiming the exemption, nor do the cases upon which petitioners rely support their contention.

Petitioners' "Fire" Cases Distinguished

While those cases hold that "fire" implies "a visible flame", they do not hold that there must be an attempt to segregate the loss as between *before* and *after* the moment of ignition. They hold that the fire exemption is applicable only *if*, not applicable only *after*, "cargo actually ignites" (p. 4).

The Buckeye State, 39 F. Supp. 344, 347 involved the question whether there was a fire. There a grain cargo heated because an electric light had been left on, but there never was "visible heat or light"—hence no fire. There was no suggestion that even had fire eventually broken out, the loss, or the bulk of it, would still have been excluded from the fire exemption.

Cargo Carriers, Inc. v. *Brown S. S. Co.*, 95 F. Supp. 288, 290, is practically the same as *The Buckeye State* and was decided by the same Judge. Substantially the only difference was that the fact question—whether there was a fire—was closer.

Western Woolen Mill Co. v. *Northern Assurance Co.*, 139 Fed. 637, held that "fire" in an insurance policy likewise implied "visible heat or light". But again there was no suggestion that, had the spontaneous combustion finally eventuated into fire, the assured nevertheless would have been denied a full recovery.

Spontaneous Combustion Fires Are Not Outside the Fire Exemption

Squarely against petitioners' contention is *The Venice Maru, Consumers Co.* v. *Kabushiki Kaisha*, 133 F. (2d) 781; aff'd 320 U. S. 249. There, as petitioners state, "fire broke out in fishmeal spontaneously" and "presumably the meal must have heated for an appreciable length of

time before it fired" (p. 5). Petitioners would explain the holding that "all the damages sustained by cargo was the proximate result of fire", as merely the result of counsel's oversight!

Petitioners seek to give the impression (p. 5) that the District Court did not consider this question. But Judge Rifkind rejected the very argument presented by petitioners here (81 F. Supp. 438, at p. 446), as did also the Court of Appeals (194 F. (2d) 449, at p. 451).

Petitioners urge that the present decision would tend to encourage negligence leading up to a fire (p. 8). But that argument is, in effect, an attack upon the policy of the law in relieving the carrier from liability in respect of even negligent fires, provided the shipowner is not privy to the negligence of its subordinates. Congress, not the Courts, should consider that argument. The statutory fire exemption cannot be repealed by the Courts on the basis of some assumed policy of the law "to encourage diligence by a carrier".

In *The Venice Maru,* mentioned above as a spontaneous combustion case, open to the same argument as petitioners' contention here, this Court frowned upon "a frustration of the purpose of the Act [the fire exemption]". 320 U. S. at 254.

In *The Vallescura,* 293 U. S. 296 which petitioners rely on, there was held to be the equivalent of a finding that some of the damage was due to improper ventilation, rather than sea perils. But there is no corresponding finding here that part of the damage was due to a non-fire cause.

As to Petitioners' Second Question

The second point proposed by petitioners (p. 8) begs the question in assuming that the fire was "caused by negligent stowage", an erroneous assumption in view of the decision of the Court of Appeals. To support their point, petitioners would reargue the fact question as to the propriety of the No. 3 tweendeck stowage.

Although petitioners assert that the District Court made a general finding of improper overstowage of No. 3 tween-deck, "without relation to which particular shipments created the overstowage" (p. 10), it is clear from the part of the District Court's opinion to which petitioners refer, as well as the District Court's findings (ff. 28-30, 94; R. 2249-50, 2260-61), that any criticism of the stowage related entirely to the 139 bales. This criticism, as we have seen, was eliminated from the case by the Court of Appeals and only a fact reversal could reinstate it.

But if petitioners' assumption of negligent stowage were accepted, the answer is simple to the legal question propounded—What further is required to make the carrier liable for fire damage? Indeed, petitioners themselves answer the question by quoting from the Carriage of Goods by Sea Act—"the actual fault or privity of the carrier". It is the fact decision on this point (decided in favor of respondent) that the petition concerns itself with, not with any question of law.

As to Petitioners' Third Question

This question, in substance, is—Whether cargo must be fit for carriage upon a non-contemplated and more dangerous voyage when such voyage has become necessary because it has become impossible (without fault of the carrier) to perform the contemplated voyage? Or, must the shipowner, although not responsible for the necessity of the change, bear the risk as to cargo's adequacy for the changed, more dangerous, voyage?

Petitioners do not give any reason why this risk should be shifted to the carrier. Surely the fact that cargo may be fit for carriage on *some* voyage is hardly a basis for holding that fitness of the cargo is not required with respect to the only possible voyage, the substituted voyage undertaken with cargo's consent and upon its urging.

Petitioners base their argument on a claim of "negligence in stowage" (p. 15), so that here again petitioners

are resting on an assumed fact situation contrary to that found by the Court of Appeals.

No Adequate Reason Advanced for Allowance of the Writ

As we have seen, the three specific questions suggested in the petition either do not arise or involve only fact matters.

No question of broad public interest is presented. The case does not present any novel question as to the interpretation of the fire exemption. This is not surprising, since the fire exemption has gone back over a century in this country and over a century and a half in England. *Providence, etc., S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 602. There is no conflict between the Circuits for this Court to resolve, and although the litigation is doubtless of importance to the parties, such financial interest is not a basis for the writ.

Conclusion

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Roscoe H. Hupper
Ray Rood Allen
Counsel for Respondent,
Hellenic Lines, Ltd.

Burlingham, Veeder, Clark
& Hupper,
Of counsel.
27 William Street,
New York City.